United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original & affidavit of mailing

77-1046

To be argued by
ALVIN A. SCHALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1046

B p/s

UNITED STATES OF AMERICA,
Appellee,

—against—

ISRAEL SAFRIN,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York

ALVIN A. SCHALL,
Assistant United States Attorney,
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1046

UNITED STATES OF AMERICA,

Appellee,

—against—

ISRAEL SAFRIN,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Israel Safrin appeals from an order of the United States District Court for the Eastern District of New York (Thomas C. Platt, *J.*) entered on January 21, 1977. The order of the district court affirmed a judgment of the United States Magistrate's Court for the Eastern District (Vincent A. Catoggio, *J.*) entered on August 30, 1976. The judgment of the magistrate's court convicted appellant, following his plea of guilty, of obstructing the passage of mail, in violation of Title 18, United States Code, Section 1701. Imposition of sentence was suspended, and appellant was placed on probation for three years and directed to pay a $100 fine. In addition, as a special condition of probation, appellant was required to make full restitution of all money he had obtained from forging and cashing certain checks stolen from the mail during the period between May of 1975 and February of 1976.

The sole issue presented on appeal is whether the magistrate failed to properly exercise his discretion when he declined to sentence appellant under the Federal Youth Corrections Act (Title 18, United States Code, Section 5005 *et seq.*).

Statement of Facts[1]

I.

In November of 1975, United States Postal inspectors began an investigation into the theft of mail addressed to Beatrice Serafini of Brooklyn, New York. The investigation was in response to a complaint to the Postal Inspection Service by Mrs. F. H. Serafini of San Francisco, California. Mrs. Serafini advised that in October of 1975 she had mailed a letter containing a $400 check to her daughter Beatrice in Brooklyn. Beatrice, Mrs. Serafini said, never received the letter, but the check was returned to her (Mrs. Serafini) after being cashed with a forged endorsement (P. 3).

The investigation revealed that appellant had forged the endorsement and cashed the check and that he had shared half the proceeds with his friend Samuel Strasser

---

[1] References herein preceded by the letter "P" are to pages of appellant's pre-sentence report, a copy of which will be made available to each member of the panel which will hear this case. References designated "App." are to appellant's appendix. The pages of the appendix have not been consecutively numbered; instead, the appendix has been broken down into four sections and marked with tabs ("A", "B", "C", and "D"). Part A consists of two pages, while Parts B and D consist of one page each. Part C (containing the transcript of appellant's sentencing) is nine pages long. References to Parts A, B and D are to those sections in their entirety and are designated "App. A", etc. References to Part C are designated with the appropriate page number. Thus, "App. C. 3" refers to page three of Part C of appellant's appendix.

(P. 3-5). The authorities also learned that between May of 1975 and February of 1976 Strasser had stolen the Serafini check and six other checks and had given them to appellant so that he could forge endorsements on them and cash them. Altogether, appellant and Strasser shared $2,663.00 in proceeds from these illegal transactions (P. 4-5).

On May 20, 1976, appellant was arrested and brought before the magistrate on a complaint charging him with unlawful possession of stolen mail, in violation of Title 18, United States Code, Sections 1708 and 2, a felony for which he could have received a sentence of five years imprisonment and a fine of $2,000 (App. A.). Subsequently, on July 9, 1976, the United States Attorney's Office filed a one count information (76 Cr. 443) against appellant, charging him with the lesser crime of obstructing the passage of mail, in violation of Title 18, United States Code, Section 1701, a petty offense for which he was subject to a maximum penalty of six months imprisonment and a $100 fine (App. A, B). On July 19, 1976, appellant appeared before the magistrate, waived trial in the district court and pleaded guilty to the information (App. A).

At the time of his guilty plea, appellant was twenty-two years old, his birth date being March 28, 1954 (P. 1).

II.

Appellant appeared before Magistrate Catoggio for sentencing on August 30, 1976. After a brief statement by appellant, appellant's lawyer, Ms. Marion Seltzer of the Legal Aid Society, addressed the court. Ms. Seltzer emphasized that, as indicated in the pre-sentence report, her client had an exemplary background and had never before been involved in criminal activity (App. C. 3).

Stressing the traumatic effect of the arrest and guilty plea on appellant and noting that appellant enjoyed close relationships with his family and friends, Ms. Seltzer opined that appellant would never be before the court again and asked the court to be lenient and to impose a probationary sentence (App. C. 3).

The court responded by stating that it was not going to impose a jail sentence on appellant (App. C. 4). Magistrate Catoggio then turned to the question of whether appellant should be sentenced under the Youth Corrections Act, for which he was eligible as a "young adult offender" under Title 18, United States Code, Section 4216 (App. C. 4). After correctly pointing out that he had to make an affirmative finding that appellant would benefit from the Act, the magistrate noted that appellant had been involved in the forging of seven separately stolen checks. Following some further colloquy with defense counsel, the court stated that it saw "nothing" in the case to warrant sentencing appellant under the Youth Corrections Act (App. C. 8). The magistrate then suspended the imposition of sentence, placed appellant on probation (with the special condition of restitution noted above) and fined him $100.[2]

III.

After his conviction, appellant appealed to the district court, contending that the magistrate had abused his discretion in sentencing him by failing to properly evaluate his eligibility for Youth Corrections Act treatment. On January 21, 1977, the district court affirmed the conviction without opinion (App. A, D), and this appeal followed.

---

[2] Appellant's accomplice, Samuel Strasser, also pleaded guilty to a violation of Section 1701. Strasser received a sentence identical to appellant's. Strasser has not appealed his conviction.

ARGUMENT

Appellant Was Properly Sentenced.

On appeal, appellant argues that his sentence was illegally imposed. He bases the claim on the contention that in denying him Youth Corrections Act treatment as a "young adult offender," the magistrate abused his discretion by allegedly placing undue emphasis on appellant's involvement in the crime to which he pleaded guilty. We respectfully submit that the claim is totally without merit.

The Youth Corrections Act is available as a sentencing option for defendants between the ages of eighteen and twenty-two ("youth offenders"). Title 18, United States Code, Section 5006(d). The statute provides that for a youth offender a Y.C.A. sentence should presumptively be imposed unless the judge finds "that the youth offender will not derive benefit from treatment." Title 18, United States Code, Section 5010(d). Thus, whenever a court sentences a defendant between th ages of eighteen and twenty-two, it must consider the availability of the Act, and, if it chooses not to exercise the option of Y.C.A. treatment, it must make a specific finding on the record that the defendant will not benefit from a Y.C.A. sentence. *Dorszynski* v. *United States*, 418 U.S. 424, 442-444 (1974); *United States* v. *Kaylor*, 491 F.2d 1133, 1137-1138 (2d Cir.) (*en banc*), *vacated for reconsideration on other grounds sub nom. United States* v. *Hopkins*, 418 U.S. 909 (1974).[3]

Federal law also provides Youth Corrections Act treatment for another class of young offenders. These are

---

[3] However, the court need not state its reasons for making the finding of "no benefit." *Dorszynski* v. *United States*, *supra*, 418 U.S. at 441-442.

defendants who, like appellant, are twenty-two but not yet twenty-six at the time of conviction. They are designated "young adult offenders." Title 18, United States Code, Section 4216. While, as noted above, there is a statutory presumption in favor of Y.C.A. treatment for youth offenders, young adult offenders may be sentenced under the Act only if

> after taking into consideration the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, mental and physical health and such other factors as may be considered pertinent, the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the Act.

Title 18, United States Code, Section 4216. Accordingly, it has been held that a defendant who is between twenty-two and twenty-six may only be sentenced under the Youth Corrections Act if the court first makes a specific finding on the record that the defendant will benefit from treatment under the Act. *United States* v. *Torun*, 537 F.2d 661 (2d Cir. 1976). Thus, if a judge passes sentence on a young adult offender and says nothing, Y.C.A. treatment will automatically be denied.

As noted above, the crux of appellant's appeal is the claim that the magistrate abused his discretion at sentencing. Specifically, it is argued that in denying Y.C.A. treatment, the court placed undue emphasis on the crime to which appellant pleaded guilty and did not take into account appellant's background and other aspects of the case. Thus, appellant relies on the proposition that although a sentence—such as his—which is within statutory limits is not generally subject to appellate review, *United States* v. *Seijo*, 537 F.2d 694, 700 (2d Cir. 1976), an appeal will lie and the sentence will be vacated where

it can be shown that the sentence was imposed in a "fixed and mechanical way." *United States* v. *Schwartz*, 500 F.2d 1350, 1352 (2d Cir. 1974).

We believe, however, that the recent decision of this Court in *United States* v. *Negron*, 548 F.2d 1085 (2d Cir. 1977), is squarely dispositive of appellant's argument. In *Negron*, the defendant, who was twenty-three, pleaded guilty to the charge of distributing approximately a kilogram of cocaine, in violation of Title 21, United States Code, Section 841(a)(1). Subsequently, he was sentenced to ten years imprisonment and a fifteen year special parole term, with the special condition that he be deported to Colombia, South America, upon completion of the jail sentence. In denying Negron Youth Corrections Act treatment as a young adult offender, the judge stated (548 F.2d at 1086):

> [I]n view of Negron's involvement in the matter before the Court and the particular part that he took in that involvement, the Court denies him Y.C.A. treatment.

On appeal, Negron argued that the court had not properly exercised its discretion in sentencing him. It was contended that he was denied Y.C.A. treatment only because of his participation in the cocaine transaction. Hence, Negron claimed, the judge failed to use his discretion in denying Y.C.A. treatment.

This Court squarely rejected Negron's argument. It was pointed out first of all that the judge did not base his decision on the single fact that Negron had violated Title 21, United States Code, Section 841(a)(1). Rather, the judge had noted the particular "part played" by Negron in the narcotics sale. In addition, the court recognized that before imposing sentence, the judge "had read and considered" the pre-sentence report, which gave

details relevant to several of the factors to be considered under Section 4216. *United States* v. *Negron*, *supra*, 548 F.2d at 1087. Finally, it was noted that it was clear from the record that the judge had considered the option of a Y.C.A. sentence and had rejected it.

The facts of this case make it virtually indistinguishable from *Negron*. First of all, it is clear from the record that the magistrate was fully aware of the possibility of a Y.C.A. sentence (App. C. 4). Similarly, the record also shows that the magistrate had before him, and had read and considered, the pre-sentence report.[4] The report contained information concerning appellant's personal history, his family background, his home and neighborhood, his education, his religion, his physical and mental health and his job experience (App. C. 6-12), all factors which should be taken into account in determining whether a defendant should be given a Y.C.A. sentence as a young adult offender. Title 18, United States Code, Section 4216; *United States* v. *Negron*, *supra*, 548 F.2d at 1087. In addition, appellant's lawyer, Ms. Seltzer, spoke forcefully on behalf of her client and argued for leniency on the basis of the positive aspects in appellant's background and personal history (App. C. 2-4). Finally, although the magistrate did comment on the fact that appellant had forged seven stolen checks, in denying Y.C.A. treatment, the magistrate specifically stated that he could find "nothing" in the case to justify a Y.C.A. sentence (App. C. 8), thus plainly demonstrat-

---

[4] In commenting upon the fact that possibly appellant was not entitled to Legal Aid representation, the magistrate noted, as set out in the pre-sentence report, the jobs which appellant had held (App. C. 7). Earlier the magistrate had remarked upon the fact, also set forth in the report, that appellant had forged six additional checks, besides the one payable to Beatrice Serafini (App. C. 4-6).

ing that he had considered the whole record and the various points discussed in the pre-sentence report and argued by Ms. Seltzer.[5]

In conclusion, we submit that the record clearly shows that appellant's sentence was not illegally imposed. On the contrary, all relevant factors were considered, and the magistrate properly exercised his discretion. The appeal is without merit.

CONCLUSION

The order of the district court affirming the judgment of conviction should be affirmed.

Dated: Brooklyn, New York
April 25, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
Assistant United States Attorney,
Of Counsel.

---

[5] Moreover, while sentence cannot be imposed *simply* on the basis of the offense involved, it goes without saying that the crime committed is certainly *one* of the "pertinent" factors which a sentencing court should consider.

★ U. S. Government Printing Office 1976— 714—018—080

Form No. USA-52-6b
(Ed. 9-4-64)

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

ESTHER TINORT being duly sworn,

deposes and says that he is employed in the office of United States Attorney

United States Attorney for

the Eastern District of New York, attorney for the Appellee

herein.

That on the 27th day of April 19 77, he did serve a true copy of

the hereto annexed Brief for the Appellee

on the office of Legal Aid Society

attorney for the Appellant herein, located at

509 U. S. Courthouse, Foley Square, New York City 10007

Borough of New York, City of New York, by leaving a true copy of the same with the person in charge of said office, there being no one present who was authorized to give an admission of service.

Esther N. Tinort

Sworn to before me this

27th day of April 19 77

Carolyn N. Johnson

NOTARY PUBLIC, State of New York
No. 41-4507178
Qualified in Queens County
Term Expires March 30, 19 79

Sir:

You will please take notice that a ..... *of which the within is copy, was this day duly entered in the within entitled action, in the office of the Clerk of this Court.*

Dated, Brooklyn, New York ..... *19*.....

Yours, etc.,

.....

United States Attorney,

Attorney for .....

To

.....

Attorney for .....

Sir:

Please take notice that the within ..... *will be presented for settlement and signature to the Honorable* ..... *at the office of the clerk,* .....

.....

Borough of ..... *City of New York, on the* ..... *day of* ....., *19* ....., *at* ..... *o'clock in the* ..... *noon, or as soon thereafter as counsel can be heard.*

Dated, Brooklyn, New York ..... *19*.....

Yours, etc.,

.....

United States Attorney,

Attorney for .....

To

.....

Attorney for .....

Court Index No.

.....

United States Attorney,

Attorney for .....

Due service of a copy of the within is hereby admitted.

New York, ..., 19.....

.....

Attorney for .....

To

.....

Attorney for .....

Form No.

FPI—SS—6-21-68—20M—2401